ORAL ARGUMENT NOT YET SCHEDULED

CASE NO. 18-1228
(Consolidated with Case No. 18-1092)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DIRECTV, LLC,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR REVIEW
FROM ORDER OF THE NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF OF PETITIONER

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The National Labor Relations Board's ("NLRB" or the "Board") Response claims that the Board "acted within [its] discretion" in finding that Petitioner DIRECTV, LLC's ("DIRECTV") Motion to Intervene, Re-Open the Record and for Reconsideration ("Motion to Intervene") was untimely and that DIRECTV was not a necessary party to the underlying unfair labor practice proceeding. (NLRB Br. at 30). Given the lack of any discernible, consistent standard for the Board's decisions regarding intervention, however, this is a meaningless statement. *See* Board's Rules and Regulations, § 102.29 (stating only that the "Regional Director or the Administrative Law Judge…may, by order, permit intervention…to such extent and upon such terms as may be deemed proper"); *Veritas Health Servs., Inc. v. NLRB*, 895 F.3d 69, 89 (D.C. Cir. 2018) (Millet, J. concurring) (criticizing the Board's "continued failure to establish any discernible, consistent standard for granting and denying intervention in agency proceedings.").

Likewise, the Board's Response denigrates DIRECTV's reliance on cases decided under Fed. R. Civ. P. 24, ignoring that this approach was necessitated by the utter lack of "a coherent body of 'established [Board] precedent'" on the subject. *Id.*[1] In any event, the Board's denial of DIRECTV's Motion to Intervene

[1] This case well-illustrates Judge Millet's concurring point in *Veritas*, 895 F.3d at 89. She compared the Board's "amorphous and indeterminate standard" under 29 C.F.R. § 102.29 with Fed. R. of Civ. P. 24, which spells out specific factors for

must be overturned because its findings regarding timeliness and adequate representation disregard DIRECTV's confidentiality interest, lack evidentiary support, and are arbitrary and capricious.

I. THE BOARD'S RULING THAT DIRECTV'S MOTION WAS UNTIMELY IS ARBITRARY AND CAPRICIOUS.

In reaching its conclusion that DIRECTV's Motion to Intervene was untimely, the Board ignored the unrebutted record evidence in favor of pure supposition that DIRECTV "should have known" about the threat to its confidentiality interest and intervened earlier. *DirectSat USA, LLC*, 366 NLRB No. 141, slip op. at 2 (July 25, 2018). This resulted in a flawed conclusion contrary to the directives of this Court that the timeliness of a motion to intervene is not required for its own sake, but must be considered in light of all the circumstances of the case.

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courts to consider in resolving motions to intervene. *Id.* And she emphasized that "transparent, consistent, and evenhanded application of identified and reasoned factors is essential to fair process" for all intervenors. *Id*. Applying Rule 24-like standards to NLRB proceedings would be especially appropriate given that the Board has decided to formulate policy almost exclusively through the process of adjudication. *See NLRB v. Bell Aerospace Co. Div. of Textron, Inc*., 416 U.S. 267, 294 (1974) (stating the Board has the choice between rulemaking and adjudication); Mark H. Grunewald, *The NLRB's First Rulemaking: An Exercise in Pragmatism*, *41 Duke L.J. 274*, 274 (1991) ("Despite having been granted both rulemaking and adjudicatory power in its statutory charter more than half a century ago, the National Labor Relations Board has chosen to formulate policy almost exclusively through the process of adjudication.").

A. The Board's Timeliness Finding Relies Purely on Speculation That DIRECTV "Should Have Known" Its Interests Were at Risk.

The Board denied DIRECTV's motion as untimely because it found DIRECTV "filed its motion long after it knew or reasonably should have known that this proceeding could result, and indeed had resulted, in an order requiring full disclosure of the HSP." *DirectSat USA, LLC*, 366 NLRB No. 141, slip op. at 2. Because the only evidence regarding DIRECTV's knowledge is the Sellers Declaration and Amended Sellers Declaration, both of which state that DIRECTV "had no knowledge of . . . the proceedings before the Administrative Law Judge and National Labor Relations Board, until . . . the Board's March 20, 2018 decision," it is undisputed that there is no evidence of DIRECTV's *actual* knowledge that would make its intervention untimely. (Sellers Decl., ¶ 7; Am. Sellers Decl., ¶ 7). Therefore, the Board is left with nothing more than speculation that DIRECTV "should have known"[2] that its confidentiality interest was at risk.

In its Response, the Board seeks to support this speculation by contending

[2] The Board seems to have crafted this "should have known" timeliness standard for this case, as it does not appear in the NLRB intervention cases cited by the Board in its brief. *See, e.g., The Boeing Co.*, 366 NLRB No. 128 (July 17, 2018) (does not mention a "should have known" standard); *U.S. Postal Service*, No. 05-CA-122166, 2015 WL 3932157 (NLRB June 25, 2015) (same); *Oak Harbor Freight Lines*, 361 NLRB No. 82 (2014) (same). The "should have known" standard is one without boundaries and allows the Board to decide cases on supposition unless it is cabined by the other timeliness factors the Court considers under Rule 24.

that the Home Services Provide Agreement ("HSP") evidences that DIRECTV should have known its confidentiality interest was at stake and therefore should have filed its Motion to Intervene earlier in the process. It asserts that this is so because the HSP contains a procedure for handling court or government agency directives to disclose confidential information that requires DirectSat to provide notice to DIRECTV prior to any such disclosure. (NLRB Br. at 31). The Board further claims that "by itself, the mere existence of this contingency plan" supports a finding that DIRECTV "should have known its confidentiality interest was at stake." *Id*. (emphasis added). But it does not follow that "the mere existence" of a notice requirement results in actual notice. Indeed, the uncontradicted evidence establishes that "DIRECTV did not receive notice of this case as contemplated by the HSP." (Am. Sellers Decl., ¶ 7) (emphasis added). Further, the HSP notice provision only contemplates notice to DIRECTV after there is a government agency or court order in existence requiring disclosure, at which point, intervention is already untimely in the Board's view. (Am. Sellers Decl., ¶ 5).

Nevertheless, the Board continues to insist that, despite the evidence to the contrary, "the system worked," and DIRECTV's limited notice of the unfair labor practice charge from DirectSat was sufficient to make it aware of the need to promptly intervene, especially because it is a "sophisticated actor." (NLRB Br. at 31-33). But again, regardless of a party's sophistication, having knowledge of an

unfair labor practice charge alone[3] is not equivalent to having knowledge that one's interests are at risk such that the "clock" should start running for the purpose of determining timeliness. For this reason, this Court has recognized "the relationship between the adequacy of representation and the timeliness of an intervention motion." *See, e.g., United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1294 (D.C. Cir. 1980); *Smuck v. Hobson*, 408 F.2d 175, 181-82 (D.C. Cir. 1969) (concluding that inadequate representation in the decision whether to appeal created special circumstances that made post-judgment intervention appropriate and timely).

Until the inadequacy of DirectSat's representation came to light, DIRECTV had no reason to seek intervention. Had it done so, the Board likely would have denied its Motion to Intervene, given its theory that DIRECTV was not a necessary party. *See infra* Section II.B. Yet, the Board argues that DIRECTV should have intervened earlier, implicitly embracing the untenable notion that DIRECTV (or any party in its shoes) is required to monitor the administrative agency activities of all of its subcontractors and vendors. (NLRB Br. at 32). Thus, the Board's speculation that DIRECTV's Motion to Intervene was untimely because it "should

[3] The Board states that the complaint against DirectSat issued on September 23, 2016—before DirecTV's discussions with DirectSat in November/December 2016. (NLRB Br. at 32 n.21). DIRECTV does not dispute the timing of the complaint but again asserts that the uncontradicted evidence establishes that DIRECTV was not aware that the complaint had issued. (Am. Sellers Decl. at ¶ 7).

have known" its confidentiality interest was at risk has resulted in a decision that is both unreasonable and unsupported by the evidence.

B. The Board's Focus on Timeliness as a Threshold Inquiry Ignores That Timeliness Should Be Considered in Light of All the Circumstances of the Case.

While maintaining that the cases decided in the Rule 24 context are not applicable, the Board says that DIRECTV's argument "puts the cart before the horse" because such cases dictate that motions to intervene must be timely before courts, or presumably the Board (although the Board's case law has not defined timeliness), may consider the merits of the motions. (NLRB Br. at 33). Under Rule 24, this Court has held that a motion to intervene must be timely as a threshold matter. *See Amador Cnty., Cal. v. U.S. Dep't of the Interior,* 772 F.3d 901, 903 (D.C. Cir. 2014). But contrary to the Board's holding below and the NLRB decisions it cites in its brief, "the length of time passed 'is not in itself the determinative test.'" *Id*. at 905 (quoting *Roane v. Leonhart*, 741 F.3d 147, 151 (D.C. Cir. 2014). "Timeliness is not required for its own sake" because it is not a punishment for the dilatory; rather, the timeliness requirement is aimed at preventing potential intervenors from unduly disrupting litigation to the unfair detriment of the existing parties. *Amador Cnty.,* 772 F.3d at 903 (citing *Roane*, 741 F.3d at 151; 7C Charles Alan Wright et al., *Federal Practice and Procedure* § 1916 at 532 (3d ed. 2007)).

Accordingly, under Rule 24, whether a motion to intervene is timely is evaluated in light of all of the circumstances including: (i) the time elapsed since the inception of the suit, (ii) the purpose for which the intervention is sought, (iii) the need for intervention as a means of preserving the applicant's rights, and (iv) the probability of prejudice to the parties already in the case. *Amador Cnty.*, 772 F.3d at 903 (citing *U.S. v. British Am. Tobacco Australia Servs., Ltd.*, 437 F.3d 1235, 1238 (D.C. Cir. 2006)); *Acree v. Republic of Iraq*, 370 F.3d 41, 49 (D.C. Cir. 2004); *Smoke v. Norton*, 252 F.3d 468, 471 (D.C. Cir. 2001) (quoting *Am. Tel. & Tel. Co.*, 642 F.2d at 1294-95). The Board's decision to deny DIRECTV's motion as untimely because it was filed "after the [ALJ and] Board had already issued [their] decision"[4] only addresses the first consideration and elevates the length of time passed to a determinative factor in and of itself.[5] Although this factor

[4] *DirectSat USA, LLC*, 366 NLRB No. 141, slip op. at 2.

[5] The same is true for cases in which the Board claims it has denied other post-judgment motions purely on timeliness grounds. *See, e.g., U.S. Postal Serv.*, 2015 WL 3932157, at *1 (denying motion filed three months after issuance of Board decision as untimely); *Oak Harbor Freight Lines, Inc.*, 361 NLRB at 884 n.1 (finding motion filed after issuance Board decision untimely). Moreover, with no guidance on the Board's definition of "timely" and cases decided both ways, it is impossible to determine when a motion will be found untimely under the Board's discretionary standard. *See, e.g., Drukker Comms.*, 299 NLRB 856 (1990) (permitting intervention after issuance of Board decision); *Premier Cablevision*, 293 NLRB 931 (1989) (permitting post-hearing intervention); *Postal Serv.*, 275 NLRB 360 (1985) (same); *William Penn Broadcasting Co.*, 94 NLRB 1175 (1951) (permitting intervention after issuance of Board decision).

standing alone weighs against granting DIRECTV's motion, when the other factors and the totality of the circumstances are assessed, it is clear that the Board abused its discretion in denying the motion.

First, DIRECTV does not seek to intervene here to re-litigate whether the HSP is relevant to the negotiations between DirectSat and the Union. It is not a party to those negotiations. Instead, it seeks intervention to present evidence regarding its confidentiality interest, to cause the Board to amend its remedy, and to accord that interest adequate protection. Thus, DIRECTV's purpose in seeking intervention is solely to protect its confidentiality interest, an interest that is worthy of special consideration under Supreme Court precedent. *Detroit Edison v. NLRB*, 440 U.S. 301, 315-16 (1979).[6]

Second, it is necessary for DIRECTV to intervene to protect its interest because DirectSat failed to make a confidentiality argument to the ALJ or Board, and thus, is prevented from doing so on appeal to this Court as well. Therefore, absent DIRECTV's intervention, its confidential information contained in the HSP may be disclosed to the Union without any consideration or balancing of its confidentiality interest with the Union's need for information.

Third, none of the parties to these proceedings would be prejudiced by

[6] *See* further discussion of *Detroit Edison* and its relevance to the instant case *infra* Section II.A.

allowing DIRECTV to intervene and assert its confidentiality interest. Although the Board's brief claims that its practice is to deny intervention where it would result in "delay and prejudice to existing parties, and the undermining of the orderly administration of justice," the Board did not even address these factors in its decision. (NLRB Br. at 36). Thus, this *post hoc* rationalization is an insufficient basis upon which to uphold the Board's decision. *See NLRB v. Metropolitan Ins. Co.*, 380 U.S. 438, 444 (1965) ("courts may not accept appellate counsel's *post hoc* rationalizations for agency action"); *Tradesmen Intern., Inc. v. NLRB*, 275 F.3d 1137, 1144 (D.C. Cir. 2002) (noting that "agency decisions must generally be affirmed on the grounds stated in them.").

In any event, there is little or no risk of such prejudice or delay in this case. This case had been pending for almost two years by the time the Board issued its order. *See DirectSat*, 366 NLRB No. 40, slip op. at 3 n.1 (March 20, 2018). But the issuance of a Board order does not result in finality. The Board's orders are not self-executing, and at the time DIRECTV filed its Motion to Intervene, DirectSat had already filed its Petition for Review[7] of the Board's order. *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 952 (D.C. Cir. 2013) (citing Robert A. Gorman & Matthew W. Finkin, *Basic Text On Labor Law: Unionization And Collective Bargaining* 14 (2d ed. 2004); *see also NLRB v. P*I*E Nationwide, Inc.*, 894 F.2d

[7] *See* Doc. No. 1725577 (April 3, 2018).

887, 890 (7th Cir. 1990) ("A remedial order issued by the Labor Board is not self-executing. The respondent can violate it with impunity until a court of appeals issues an order enforcing it."). Moreover, the Board still had jurisdiction over the case when DIRECTV filed its motion because the Board had not yet transferred the record to this Court. *See* 29 U.S.C. § 160(d) – (f) (the Board may modify or set aside any finding or order until the record in a case has been filed, at which point the court's jurisdiction becomes exclusive); Doc. No. 1731817 (May 5, 2018) (granting NLRB's motion to extend time to file record until 7 days after the NLRB ruled on DIRECTV's motion). This case had already been pending for a long time and was going to be pending for a long time more when DIRECTV asked to be heard on the confidentiality issue.

Finally, as the Supreme Court noted in *Detroit Edison*, the issue of disclosing confidential information and any protections for same is a question of remedy, not of liability. *See Detroit Edison*, 440 U.S. at 312-13; *Oil, Chem. & Atomic Workers Local Union No. 6-418*, 711 F.2d at 362. Therefore, any issues regarding the scope of DIRECTV's interest and how it could be protected could have been addressed while the case was still before the Board, or, if such proceedings become necessary, could be deferred to compliance proceedings. It will not disturb any finding of violation, and there will not be any delay or prejudice to the existing parties or undermining of the orderly administration of

justice. Instead, all granting intervention would have done at the time is that it would have allowed for the issue to be addressed, or now, it will give DIRECTV a seat at the compliance table.

Thus, as this Court's Rule 24 cases demonstrate, the Board's focus on timeliness in and of itself, without consideration of these other circumstances, such as the purpose of intervention and the absence of prejudice and delay, constitutes an abuse of discretion. *See Amador Cnty.*, 772 F.3d at 905 (explaining the Court has "held that a decision maker abuses it discretion if it fails to consider a relevant factor").

II. DIRECTSAT DID NOT AND COULD NOT ADEQUATELY REPRESENT DIRECTV'S INTERESTS BECAUSE IT DID NOT ASSERT DIRECTV'S CONFIDENTIALITY INTEREST.

The Board's counsel argues that the Court need not reach the issue of whether DIRECTV is a necessary party, but if it does, DirectSat and DIRECTV had a "community of interest" in keeping the HSP confidential, and DirectSat could have represented DIRECTV's confidentiality interest. As an initial matter, for the reasons discussed above, this Court should reach the issue of whether DIRECTV is a "necessary party" because this issue is inextricably intertwined with the issue of timeliness. *See, e.g.*, *British Am. Tobacco Australia Servs., Ltd.*, 437 F.3d at 1238.

Further, regardless of whether DirectSat could have asserted DIRECTV's

confidentiality interest, the fact remains that it did not do so. As a result, this case involves one of those instances where post-hearing intervention is proper, because, to quote the Board's brief, DIRECTV does "possess[] interests that [are] different from, and [cannot] be adequately protected by, the existing parties." (NLRB Br. at 35-36, citing *The Boeing Co*., 366 NLRB No. 128) (July 17, 2018)). DirectSat did not assert and cannot now assert that the HSP contains DIRECTV's confidential information, but DIRECTV can. The Board's decision that DIRECTV was not a necessary party is therefore arbitrary and capricious.

A. The Supreme Court's Decision in *Detroit Edison* Requires the Board to Protect Confidentiality Interests.

Although the Board assumed that DIRECTV had a confidentiality interest in the HSP, it did not take any steps to protect that interest. This was error. In *Detroit Edison*, as here, the confidential nature of the information ordered disclosed by the Board was not in dispute, and there was no contention that the confidentiality interest was not legitimate and substantial. 440 U.S. at 315. The Court stated:

> The Board has cited no principle of national labor policy to warrant a remedy that would unnecessarily disserve this [confidentiality] interest, and we are unable to identify one.

Id. The Court concluded that the Board had failed to take steps to adequately protect the security of the documents at issue, and held that the Board had abused its remedial discretion in ordering that confidential documents be turned over to a

union. *Id*. at 315, 317. Thus, according to the Supreme Court, once there is an acknowledgement that documents the Board orders disclosed are confidential, the Board must take steps to protect the confidentiality interest. In this case, the initial step towards that end would have been to grant DIRECTV's motion. In light of DirectSat's litigation position, DIRECTV was the only entity that could protect its confidential information.

The Board relegates its analysis of *Detroit Edison* to a footnote and argues that it is distinguishable because it did not involve the rights of non-parties. (NLRB Br. at 42, n.1). But the Supreme Court's holding addressed the confidential nature of otherwise relevant documents, not the identity of the parties. The harm remedied by the *Detroit Edison* Court is the very same harm presented here—compelled disclosure of confidential information without protection. In fact, the harm here is arguably even greater because if DIRECTV is not allowed to intervene to protect its information, the protection will be lost since DirectSat failed to raise the issue in the first instance.[8]

[8] The Board may respond that it routinely orders the disclosure of allegedly confidential documents where the party claiming confidentiality did not appropriately raise the issue. *See, e.g., Crozer-Chester Med. Ctr*., 366 NLRB No. 28 (March 7, 2018) (ordering disclosure without protection of documents employer claimed confidential over Member Emanuel's dissent), *appeal filed*, Nos. 18-1640, 18-1973 (3d Cir. March 23, 2018); *U.S. Postal Serv*., 364 NLRB No. 27, slip op. (June 15, 2016) (ordering disclosure without protection of documents claimed confidential by the employer over Member Miscimarra's dissent). These cases involved employers in bargaining relationships with unions who failed to seek an

B. DirectSat's Relevance Argument Is Insufficient to Protect DIRECTV's Confidentiality Interest.

The Board argues that DIRECTV is not a necessary party because DirectSat has consistently resisted disclosure of the HSP on relevance grounds, and if it were successful in this argument, DirecSat would have protected the HSP from disclosure. Laying aside for the moment the fact that DirectSat was not successful in defending the HSP from disclosure, the Board's argument misses the point.

As DIRECTV pointed out in its opening brief, the analysis of whether a document is relevant to a union's bargaining duty under Section 8(a)(5) is a different inquiry than whether the information at issue is confidential. (DIRECTV Br. at 30-31). *Detroit Edison* states that a union's interest in arguably relevant information must be balanced against an asserted confidentiality interest. *Id*. at 317-18. Stated another way, even a relevant document may still need redaction or potentially be withheld from disclosure because it contains confidential information. *See Oil, Chem. & Atomic Workers Local Union No. 6-418 v. NLRB*, 711 F.2d 348, 360 (D.C. Cir. 1983) ("[A] finding of relevance does not ensure that

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accommodation with the union of their confidentiality concerns. Here, in contrast, DIRECTV has no standing to do the same unless it is allowed to intervene. Moreover, the Board majority in these cases did not cite or rely on *Detroit Edison*, and the dissents criticized the Board for allowing the disclosure of confidential information without protection. Finally, earlier Board authority took steps under *Detroit Edison* to protect confidential information even where a party had failed to properly assert such protections, and the Board did not expressly overrule these decisions. *See, e.g., International Protective Servs., Inc*. 339 NLRB 701, 704-05 (2003); *Rosenburg Forest Prods. Co*., 331 NLRB 999, 1001 (2000).

the union will receive all of the desired information in the precise form it requested. This court has long recognized that particular circumstances sometimes warrant a refusal to disclose or the imposition of conditions upon the production of requested information."); *Pa. Power Co.*, 301 N.L.R.B. 1104, 1105 (1991) (the Board must "balance a union's need for the information against any 'legitimate and substantial' confidentiality interests established by the employer.").

To say that DirectSat's relevance argument could have protected DIRECTV's confidentiality interest, especially when it did not in fact do so, is exactly the type of results-oriented reasoning for which the Board has been repeatedly criticized. *See, e.g., 6 West Ltd. Corp. v. NLRB*, 237 F.3d 767, 779 (7th Cir. 2001) ("Once again, the Board's decision displays result-oriented decision-making rather than the even, well-reasoned application of the NLRA, precedent, and common sense."); *NLRB v. Porta Sys. Corp.*, 625 F.2d 399, 405 (2d Cir. 1980) (Van Graafeiland, J., concurring in part and dissenting in part) ("This result-oriented method of fact-finding should come to an end."). In sum, a determination that a document is relevant is the first step of a two-step inquiry, the second being whether the document needs protection because it is confidential. The Board's holding below and its argument to this Court improperly seek to eliminate the second inquiry, thereby disserving DIRECTV's confidentiality interest contrary to the requirements of *Detroit Edison*.

C. The Board's "Community of Interest" Analysis Serves as a Basis for Granting DIRECTV's Motion Rather Than Denying It.

Next, the Board held below and argues here that because DirectSat and DIRECTV had a "community of interest" in protecting the confidentiality of the HSP DIRECTV is not a necessary party. (NLRB Br. at 25-27). Not only is the Board's "community of interest" analysis—which is unsupported by any citation to case law[9]—an insufficient basis on which to deny DIRECTV's motion, but also it illustrates why the motion should be granted.

In the first place, the Board's "community of interest" analysis as applied here is inconsistent and ignores DIRECTV's actual interest in favor of DirectSat's unexercised, inchoate potential to act. The Board's community of interest theory makes sense only if it imposes obligations on and affords rights to both parties. Inconsistently, despite the "community of interest," the Board's theory holds that because one party to the HSP failed to uphold its end of the bargain, the other party, whose confidential information is at risk, is out of luck and its confidential information will be released into the world regardless of what it does.

In the second place, it appears that the Board has sub rosa adopted a standard that anytime there is an agreement at issue such as the HSP, the non-party to the

[9] The Board contends that DIRECTV did not challenge its "community of interest" finding in its opening brief. (NLRB Br. at 39). The evidence of what the HSP says in this regard speaks for itself. DIRECTV certainly argued that the factual "community of interest" relied on by the Board was an insufficient basis on which to deny DIRECTV's motion. (DIRECTV Brief at 25-29).

litigation may not intervene if there are mutual obligations and covenants in the agreement in question. Under the Board's logic, if DIRECTV is not a necessary party now, it was not earlier in the proceedings either, because DirectSat's "community of interest" means it could have protected DIRECTV's information then, too. This conclusion means that one holder of the interest is totally subject to the actions or inactions of the other, which is not a proper basis upon which to deny intervention.

The correct result, because DirectSat and DIRECTV have a "community of interest" in protecting the HSP's confidentiality, is to hold that DIRECTV is a necessary party for this limited purpose and grant DIRECTV's motion. That way, DIRECTV can assert its interest and the Board can comply with *Detroit Edison* by taking steps to protect DIRECTV's interest.

D. DIRECTV Is Not Seeking a Second Bite at the Apple; Rather, It Is Seeking to Do What DirectSat Failed to Do.

The Board says that DIRECTV knew or should have known that its confidentiality interest could be impaired, and that DIRECTV is seeking a "second bite at the apple." (NLRB Br. at 45). As explained above, these conclusions are contrary to the evidence that DIRECTV only had discussions with DirectSat about producing a redacted copy of the HSP, which DIRECTV believed was in an effort to resolve an unfair labor practice charge. (Sellers Decl., ¶ 7; Am. Sellers Dec. at ¶ 7). From this evidence, Board determined that DIRECTV should have known to

intervene at that point. This is an unwarranted leap. Regardless of what DIRECTV surmised from DirectSat's efforts to produce a redacted copy of the HSP,[10] under the Board's theory DIRECTV was not a necessary party to the case at any time and thus its motion would have been denied.

Further, the only way for DIRECTV to have a second bite at the apple is if DirectSat took a first bite by arguing that the HSP was confidential. It did not. And DIRECTV did not learn this fact until it learned about the NLRB's order. (Sellers Decl. at ¶ 7; Am. Sellers Decl. at ¶ 7).

Finally, the Board stated in its decision that DirectSat's "failure to assert confidentiality as a defense may be a matter for resolution between [DirectSat] and [DIRECTV], but is not a basis for granting [DIRECTV] intervention in this case." 366 NLRB No. 141, slip op. at 2-3. This argument has two flaws. First, the Supreme Court has directed the Board to take steps to protect confidential information when ordering disclosure on relevance grounds. *Detroit Edison*, 440 U.S. at 317-19. Second, any "resolution" between DirectSat and DIRECTV regarding this issue will not protect against the disclosure of DIRECTV's

[10] Indeed, the reasonable inference from the record evidence is that, to its detriment, DIRECTV understood that DirectSat was doing what it was supposed to do under the HSP because (a) DirectSat discussed producing a redacted version of the HSP with DIRECTV, and (b) following these discussions, DIRECTV heard nothing further about the case and believed it had been resolved. (Sellers Decl. at ¶ 7; Am. Sellers Decl. at ¶ 7).

confidential information because it will not stay the Board's disclosure order. That is why DIRECTV sought to intervene before the Board and why it was error for the Board to deny DIRECTV's motion.

CONCLUSION

For each of the reasons set forth above, as well as those included in the initial Brief of Petitioner, DIRECTV's Petition for Review should be granted, and DIRECTV should either be allowed to intervene or this case should be remanded to the NLRB for reconsideration of its motion. DIRECTV further requests that it be awarded its costs and any other relief, legal or equitable, to which it is entitled.

Dated: January 11, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii) because this brief contains 5,677 words, not including the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32.

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of January 2019, I electronically filed a true and correct copy of the foregoing using the CM/ECF system, thereby sending notification of such filing to all counsel of record.

Respectfully submitted,

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